IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 63432-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
JAMES WALTER STEVENS,	)	
	)	
Appellant.	)	FILED: June 14, 2010
	)	

Leach, A.C.J. — James Stevens appeals his conviction of possession of methamphetamine with intent to deliver. He claims that the trial court erred by failing to limit cross-examination of a proposed defense witness, by failing to suppress evidence of the warrant that led to the discovery of the methamphetamine, and, alternatively, that his counsel provided ineffective assistance by failing to request a limiting instruction for the warrant evidence. Stevens failed, however, to preserve the claim of error regarding the defense witness because he did not call that witness to testify. Admitting evidence that Stevens was arrested on a warrant for nonpayment of child support was not error and, in any event, was harmless. And Stevens's counsel did not provide ineffective assistance by failing to request a limiting instruction because she affirmatively used that evidence in Stevens's defense. We affirm.

BACKGROUND

During a routine check of license plates, a patrol officer checked a pickup truck. Department of Licensing records showed an outstanding warrant for nonpayment of child support for the registered owner, Stevens. The officer verified the existence of the warrant and stopped the truck. After confirming Stevens's identity, the officer arrested him on the warrant and searched him. He found a digital scale with white residue and methamphetamine in an interior pocket of Stevens's coat. The coat appeared to be a man's coat and fit Stevens. Stevens also had $767 in cash in his pants pocket. Stevens's cell phone rang several times during the search, which, together with the quantity of methamphetamine, the scale, and the cash, suggested to the officer that Stevens was holding the methamphetamine for sale.

The State charged Stevens with possession of methamphetamine with intent to manufacture or deliver.

At trial, before witnesses testified, the prosecutor raised an issue of the scope of her cross-examination of proposed defense witness Quintin Rehak. The defense had indicated Rehak, who was in jail, would testify that he saw Stevens winning large sums of money at a casino the night before his arrest. The prosecutor told the court that when she interviewed Rehak and asked him how he knew Stevens, Rehak said that he used to deal methamphetamine with Stevens. She sought to cross-examine Rehak about that connection to attack

his credibility based on his motive to fabricate testimony to benefit Stevens. Defense counsel objected to the specific question about their drug dealing, noting that Rehak had also said those events had happened a long time ago. Counsel told the court, however, that she saw no basis to object to an alternative question the prosecutor suggested, whether Rehak knew Stevens to be a drug dealer.

The court ruled that it would allow general questions about how the two men knew each other and whether Rehak had any knowledge that Stevens was a drug dealer, along with pertinent questions following up his answers, but would not allow evidence that they had dealt drugs together.

Also at the beginning of the trial, the defense moved in limine to suppress any reference to the warrant that led to Stevens's arrest. Counsel argued the jury only needed to know that Stevens had contact with the officer which led to his arrest. The prosecutor responded that under the res gestae rule, the evidence was admissible to explain why Stevens was searched, so the jury was not left with the impression that the officer randomly pulled cars over and searched drivers without legal cause. The trial judge found that the probative value of the evidence outweighed the prejudice. When the court offered to give a limiting instruction, defense counsel instead asked that the court require that the basis of the warrant, nonpayment of child support, be disclosed in the State's case in chief.

Stevens was the only defense witness. He testified that the night before he was arrested, he had gone to two casinos with his girl friend Bobbie in hope of winning money to pay for repairs to his well pump, for his overdue rent, and for back child support. He and Bobbie met his former girl friend Danelle at one of the casinos. Although Stevens was unlucky, Bobbie and Danelle won nearly $800 for him before the second casino closed at 6:00 the next morning. On the way home from the casino, he and Bobbie stopped by her friend Smitty's house where a garage sale was set up. Because he was cold, he asked to borrow a coat. Smitty gave him a poorly fitting woman's pink and teal windbreaker. He wore this coat without realizing the methamphetamine and scale were in an interior pocket. When he saw the patrol car, he was concerned that there might be a warrant in his child support case. After he was stopped, the officer allowed Stevens to make phone calls while he was still seated in his truck to try to reach his lawyer in the support matter. He denied that his phone ever rang.

The State called the arresting officer in rebuttal. He testified that Stevens never asked to phone his lawyer. The officer also testified that Stevens said that the jacket belonged to his buddy's girl friend, but he refused to name the buddy and never mentioned Smitty or Danelle when describing his activities and where he had obtained the cash and coat.

The jury rejected Stevens's unwitting possession defense and found him guilty.

Stevens appeals.

STANDARD OF REVIEW

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion and will be reversed only if the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.[1] Evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith.[2] However, this evidence may be admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[3] The court must balance the probative value of the evidence against any unfair prejudicial effect it may cause.[4]

ANALYSIS

Stevens first argues that the court erred in ruling that the State could ask Rehak whether he knew Stevens was a drug dealer. He contends that this evidence constituted constitutionally improper opinion testimony on the ultimate issue of his guilt and that it is therefore immaterial that trial counsel did not object to that question or that Rehak did not testify. The State responds that error, if any, was not constitutional error and that Stevens failed to preserve any

[1] State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).
[2] ER 404(b); State v. Freeburg, 105 Wn. App. 492, 497, 20 P.3d 984 (2001).
[3] ER 404(b).
[4] Freeburg, 105 Wn. App. at 497.

claim of error by declining to call Rehak to testify. We agree with the State.

Generally, to preserve the issue of whether evidence can be used to impeach a witness, that witness must be called to testify.[5] We recognize an exception to this rule, however, when the impeaching evidence flows from a constitutional violation, in which case the witness need not testify to preserve the claim of error for appeal.[6]

We disagree, first, with Stevens's premise that the challenged testimony constituted an opinion on his guilt. Assuming Rehak would have testified that he knew Stevens to be a drug dealer in the past, that testimony constituted neither a direct nor an indirect opinion that Stevens possessed the methamphetamine found on him with intent to deliver. Rather, it amounted to character evidence. ER 404(b) prohibits the use of evidence of other crimes or acts to show action in conformity therewith.[7] But settled case law holds that admitting this evidence is not constitutional error.[8]

Moreover, even if we agreed that the claimed error touched on Stevens's constitutional rights, it would not constitute manifest constitutional error that could be raised for the first time on appeal.[9] The manifest constitutional error

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[5] State v. Brown, 113 Wn.2d 520, 540-41, 782 P.2d 1013 (1989); see also Luce v. United States, 469 U.S. 38, 43, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984).

[6] Luce, 469 U.S. at 43; State v. Greve, 67 Wn. App. 166, 169-70, 834 P.2d 656 (1992).

[7] This list of other purposes for which past acts evidence may be admitted includes "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[8] State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

exception to the general rule against considering issues raised for the first time on appeal is narrow. We will find error to be manifest only when it causes actual prejudice or practical and identifiable consequences.[10] "If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted."[11]

Because of the way the issue arose, the record contains no specific offer of proof showing what Rehak's testimony would have been. After the prosecutor told the court that Rehak said he had dealt methamphetamine with Stevens, defense counsel responded that Rehak had also suggested that was a long time ago and they were not necessarily friends now. The prosecutor replied that although Rehak had implied that he did not currently associate with Stevens because Stevens was still engaged in crime, she had not questioned him about that. This inconclusive record does not establish that Rehak was going to offer "an explicit or almost explicit witness statement on an ultimate issue of fact" necessary to establish a manifest constitutional error.[12]

Nor is it obvious, as Stevens contends, that the defense did not call Rehak as a witness because of the trial court's ruling. As noted above, it is unclear how Rehak would have answered the question the court authorized. Moreover, the record suggests that counsel could have regarded Rehak's

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[9] See RAP 2.5(a)(3).
[10] State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).
[11] State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007).
[12] Kirkman, 159 Wn.2d at 938.

testimony as unhelpful because it appeared he recalled Stevens winning on slot machines at the casino, while Stevens testified only his girl friends won. The record also shows that counsel's decision may have been influenced by Rehak's own criminal history and incarceration during Stevens's trial. Given all this, Stevens's claim that the court's ruling deprived him of his right to call Rehak as a witness is speculative.[13]

Stevens, in sum, has failed to demonstrate that the trial court's ruling constituted a manifest constitutional error providing an exception to the general rule requiring him to call Rehak as a witness to preserve the claim of error.

Stevens next challenges the court's admission of evidence of the warrant on which he was arrested.

The list in ER 404(b) of purposes for which past acts evidence may be admissible is not exclusive.[14] One recognized additional purpose is the res gestae or "same transaction" exception.[15] Under this exception, evidence of other crimes or bad acts may be admitted to complete the story of a crime or to provide context for events close in time and place to the charged crime.[16] Here, as Stevens acknowledges, the trial court apparently admitted the evidence[17]

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[13] See Luce, 469 U.S. at 41-42, (failing to find error preserved on scope of impeachment when the claim is based on conjecture).

[14] State v. Hepton, 113 Wn. App. 673, 688, 54 P.3d 233 (2002).

[15] State v. Lillard, 122 Wn. App. 422, 432, 93 P.3d 969 (2004); see also State v. Tharp, 96 Wn.2d 591, 593-94, 637 P.2d 961 (1981).

[16] Lillard, 122 Wn. App. at 431-32; State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999).

[17] Before a trial court may admit 404(b) evidence, it must, on the record,

because it was very closely connected in time and place, was necessary to avoid an impression that the officer had capriciously decided to arrest and search Stevens without legal cause, and that the probative value of the evidence outweighed any potential for prejudice. Stevens nonetheless maintains that the ruling was erroneous, citing State v. Aaron[18] and State v. Johnson.[19]

Aaron and Johnson each involved hearsay evidence and a defendant's right of confrontation. They are of only limited applicability here. These cases held that out-of-court statements made to a law enforcement officer, which are otherwise hearsay, may be admitted to demonstrate the officer's state of mind only if his or her state of mind is relevant to a material issue in the case.[20] Contrary to Stevens's contention, neither case holds that no information may ever be admitted as res gestae showing the reasons for an officer's interaction with a defendant absent a challenge to the legality of that contact. Rather, Aaron indicated that an officer could properly testify that he acted upon

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(1) find by a preponderance of the evidence that the prior act or misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); Lillard, 122 Wn. App. at 431. While the trial court's on-the-record analysis here was perfunctory, a trial court's failure to completely articulate its reasoning for admitting ER 404(b) evidence is harmless error where, as here, the record as a whole is sufficient to allow effective appellate review of the trial court's decision. State v. Bowen, 48 Wn. App. 187, 191, 738 P.2d 316 (1987).

[18] 57 Wn. App. 277, 787 P.2d 949 (1990).

[19] 61 Wn. App. 539, 545, 811 P.2d 687 (1991).

[20] Johnson, 61 Wn. App. at 545, 811 P.2d 687 (1991); Aaron, 57 Wn. App. at 279-80.

"information received" to relate historical facts about a case,[21] and Johnson stated that it would have been appropriate for an officer to explain police presence at the scene of the defendant's search because they had a search warrant for the residence.[22] It was also significant in those cases that the disputed evidence constituted inadmissible hearsay unfairly connecting the defendants to the charged crime.[23]

Here, there were differences between Stevens's testimony and the officer's testimony that the jury could have considered significant. A false perception that the officer was acting without lawful authority could have unfairly colored the jury's credibility determination, and the trial court could justifiably regard any potential prejudice from evidence of a warrant for nonpayment of child support, a circumstance with no apparent connection to the charged offense, as comparatively slight. We cannot say that the basis for the trial court's decision was untenable and accordingly conclude the court did not abuse its discretion.

We also agree with the State's alternative argument that admitting evidence of the warrant, if error, was harmless. Stevens testified at length about his financial problems, including his need to pay child support, which led him to

[21] Aaron, 57 Wn. App. at 281.
[22] Johnson, 61 Wn. App. at 547.
[23] Johnson, 61 Wn. App. at 547 (discussing Aaron and distinguishing United States v. Hoffer, 869 F.2d 123, 126 (2d Cir. 1989)) ("because the testimony challenged there did not implicate the defendant in a crime").

gamble his last $70. With the basis of the warrant explained, there was little danger that the jury would infer from it that Stevens was predisposed to sell methamphetamine or that his testimony should be disregarded because he was dishonest. Leaving his arrest unexplained could have resulted in juror speculation that the reason for the arrest actually was connected to the charges. Considering the circumstances, we are satisfied that even if the trial court erred, the error was harmless because there is no reasonable probability that the outcome of the trial was affected.[24]

Finally, Stevens argues alternatively that if the trial court properly admitted the evidence of the warrant, defense counsel provided ineffective assistance by failing to request the limiting instruction the court offered to give. We disagree.

To show that counsel was ineffective, a defendant must establish both deficient representation and resulting prejudice.[25] We give considerable deference to counsel's performance and presume it was effective.[26] Deficient performance is not shown by matters that go to legitimate trial tactics.[27] To show prejudice, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the trial result would have been different.[28]

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[24] Tharp, 96 Wn.2d at 599; State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

[25] State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

[26] Thomas, 109 Wn.2d at 226.

[27] State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Stevens has established neither deficient performance nor resulting prejudice. Trial counsel made a legitimate tactical decision to forgo a limiting instruction, given her argument that the warrant evidence actually supported Stevens's unwitting possession claim because no one would knowingly carry methamphetamine while concerned about a warrant for his arrest. Affirmatively using the evidence this way would have been improper had a limiting instruction been given. Moreover, regardless of counsel's tactics, Stevens's claim of prejudice fails for the same reason that admission of the evidence, if error, was harmless.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Appelwick, J.

Schindler, J.

[28] Thomas, 109 Wn.2d at 226.